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In the Supreme Court of the United States

OCTOBER TERM, 1992

I.T.O. CORPORATION OF BALTIMORE, PETITIONER

v.

WILLIAM SELLMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1), which requires the prior written approval of an employer when a "person entitled to compensation * * * enters into a settlement with a third person," applies when a person entitled to compensation and the employer jointly settle with the third person.

2. Whether an employer, in offsetting a third-party recovery against its compensation liability under Section 33(f) of the LHWCA, 33 U.S.C. 933(f), has the burden of proving which portion of the recovery is for a person entitled to compensation and which portion is for the person's spouse for loss of consortium.

3. Whether the court of appeals complied with the federal rules and the requirements of due process when it reconsidered part of its decision in response to the petition for rehearing filed by the Director, Office of Workers' Compensation Programs.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. C1-C26) is reported at 954 F.2d 239, and its amended opinion on rehearing (Pet. App. E1-E9) is reported at 967 F.2d 971. The decision and order of the Benefits Review Board (Pet. App. B1-B55) is reported at 24 Ben. Rev. Bd. Serv. (MB) 11. The decision and order of the administrative law judge (Pet. App. A1-A49) is reported at 20 Ben. Rev. Bd. Serv. (MB) 530 (ALJ).

JURISDICTION

The court of appeals entered its initial judgment on January 22, 1992, and its amended judgment on rehearing on June 17, 1992. The petition for rehearing

of the amended judgment was denied on September 22, 1992. Pet. App. F1-F2. The petition for a writ of certiorari was filed on December 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 10, 1979, respondent William Sellman sustained severe head injuries from a 40-foot fall while working for petitioner's predecessor on the ship Algenib, which at the time was docked in Baltimore.[1] Pet. App. A10, B4, C4. On July 24, 1979, he filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA) for compensation and medical expenses arising from the fall, which left him paralyzed and confined to a long-term medical care facility. Pet. App. A10-A11, B4. For five years, until July 21, 1984, petitioner voluntarily paid benefits as the statute provides. *Id.* at A11, B4, C4; see 33 U.S.C. 907, 908, 914. By June 1984, these costs totalled $525,000 and were accumulating at the rate of $100,000 to $150,000 a year. Pet. App. A13-A14; see also *id.* at C6.

In 1982, petitioner, William Sellman, and his family sued the Algenib, its owners, and others for damages arising out of this incident. Pet. App. A11, B5, C4. Mr. Sellman, represented by his wife as guardian, alleged six causes of action in tort and admiralty. *Id.* at A11-A12. Mrs. Sellman joined her husband in a

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[1] The predecessor, Atlantic & Gulf Stevedores, merged into I.T.O. Corporation of Baltimore, the petitioner in this case, in 1983. Pet. App. A9-A10. We use the term "petitioner" to refer to both entities.

separate cause of action for loss of consortium, and their children filed a separate claim for damage to their filial relationship. *Id.* at A12.

On June 1, 1984, the attorney for the Algenib's owners notified petitioner and the Sellmans that the ship's mortgagee had started foreclosure proceedings on the ship, which was the owners' only asset. Pet. App. A13, B5. Because the ship was about to be impounded and sold for less than the mortgage amount unless the ITO-Sellman suit was settled in very short order, and no American liens were expected to have priority, petitioner and the Sellmans began expedited settlement negotiations with the shipowners. *Ibid.* On June 18, 1984, they executed two settlements with the Algenib and its owners. *Id.* at A23, B6. Under the "I.T.O. agreement," petitioner received $250,000, and under the "Sellman agreement," the Sellmans received $250,000. Both agreements noted that petitioner had an outstanding lien for the $525,000 in LHWCA benefits it had paid, and that Mr. Sellman remained responsible for the lien "in the event that there is any recovery of any sums of money from any other party not named as a Defendant herein." *Id.* at A18; see *id.* at B6.[2]

On June 28, 1984, to satisfy a contingency in both settlements, the Sellmans' attorney petitioned the

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[2] Courts have construed Section 33(f) of the LHWCA, 33 U.S.C. 933(f), to give an employer a lien on a claimant's third-party recovery so that the employer can recoup benefits already paid, as well as seek a reduction of future payments. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 80-81 & n.6 (1980); *Ochoa* v. *Employers Nat'l Ins. Co.*, 754 F.2d 1196, 1198 (5th Cir. 1985).

state court with guardianship jurisdiction over Mr. Sellman to approve the Sellman agreement. Pet. App. A23-A24, A26, B6-B7, C6. The petition, which petitioner's attorney had earlier reviewed without objection, stated that petitioner remained liable for uninterrupted LHWCA compensation and medical benefits and that the Sellman agreement was totally for Mrs. Sellman's loss of consortium. *Id.* at A24-A25, B9. On July 2, 1984, the state court approved the agreement and on July 10, 1984, the Algenib defendants delivered the $250,000 in proceeds from the I.T.O. agreement to petitioner. *Id.* at A27.

Eleven days later, on July 21, 1984, petitioner made its last payment of LHWCA compensation. Pet. App. A5, B4, C4. On August 2, 1984, it notified the Sellmans and the Department of Labor that it had suspended its compensation payments until it had offset the proceeds from the Sellman settlement against its future LHWCA liabilities. *Id.* at A28. Petitioner also refused to sign the standard form evidencing its consent to the settlement of William Sellman's claim against the Algenib defendants. *Id.* at A28-A29, B8. Mr. Sellman subsequently obtained an ALJ hearing to determine his eligibility for future compensation, *id.* at A1-A2, and petitioner alleged that under Section 33(g) of the LHWCA, its refusal to sign relieved it of liability for any future compensation. *Id.* at B11-B12.[3]

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[3] At the time of petitioner's refusal, Section 33(g) provided for forfeiture of compensation if a person entitled to compensation entered into a settlement with a third party without the employer's prior written approval, which "shall be made on a form provided by the Secretary [of Labor]." 33 U.S.C. 933(g)

2. The ALJ awarded compensation. He reasoned that petitioner was not entitled to offset any part of the Sellman settlement because the parties to the Algenib lawsuit had intended that settlement to be solely for Mrs. Sellman's loss of consortium. Pet. App. A34-A40. The ALJ found the settlements ambiguous on how the Sellman proceeds should be apportioned and determined the parties' intent through extrinsic evidence. *Id.* at A35-A38. Crediting the testimony of attorneys for the Algenib defendants and the Sellmans over the testimony of petitioner's attorney, the ALJ found both that the state court petition for approval of the Sellman agreement was part of the Algenib settlement and that petitioner was estopped from objecting to the petition's terms setting out the parties' intent. *Id.* at A35-A39.

The ALJ also rejected petitioner's argument that its refusal to sign the Department of Labor's consent form relieved it of all compensation liability under Section 33(g). Pet. App. A40-A45. The ALJ recognized that because Mr. Sellman was receiving compensation at the time of settlement, he was a "person entitled to compensation" as the Benefits Review Board had construed that phrase, and that in several cases the Board and the Fifth Circuit had

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(1982). In September 1984, Congress amended Section 33(g) to provide for a forfeiture of medical benefits as well as compensation either in that event or if an employee failed to notify the employer of any settlement or judgment against a third party. See 33 U.S.C. 933(g)(2); Pub. L. No. 98-426, § 21(d), 98 Stat. 1652. As of the ALJ hearing, petitioner continued to pay Mr. Sellman's medical expenses, Pet. App. A11, and the Board held that those expenses were not subject to termination under the amended Section 33(g). Pet. App. B12-B14.

refused to read exceptions into Section 33(g)'s approval requirement. Pet. App. A41-A42. The ALJ stated that these precedents did not control the instant case, however, because petitioner itself entered the settlement and the claimant was not acting unilaterally against the employer's interests. *Id.* at A43. The ALJ concluded that applying Section 33(g) in these circumstances would do little to further that Section's purpose of protecting the employer against unilateral settlements, or the LHWCA's purpose of compensating injured longshore workers. Pet. App. A43-A44. Instead, it would lead to a "harsh and unfair" result of rewarding an employer who "orally agreed to execute the [Department's] form, reaped the benefits from its settlement agreement and then reneged on signing the form for the sole purpose of defeating [Sellman's] right to recover." *Id.* at A44-A45.[4]

3. The Benefits Review Board affirmed. It rejected petitioner's argument that the ALJ impermissibly created an equitable exception to Section 33(g). Instead, the Board ruled that petitioner had given constructive approval to the Sellman settlement. Pet. App. B14-B20. It further agreed with the interpretation of the statute advanced by the Director, Office of Workers' Compensation Programs, that the requirement of employer approval of a third-party settlement under Section 33(g) does not apply where, as here, the "employer is also a party to the settlement." Pet. App. B20.

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[4] The ALJ also found that petitioner was not liable for costs in obtaining a guardianship for Mr. Sellman. Pet. App. A45-A46. Those costs are no longer at issue.

A majority of the Board also affirmed the ALJ's conclusion that petitioner was not entitled to offset the net proceeds of the Sellman settlement against its future LHWCA obligations. It reasoned that the parol evidence rule did not apply because neither the I.T.O. nor the Sellman agreement specified whether I.T.O. waived its offset rights. The Board thus concluded that the ALJ's reliance on extrinsic evidence to establish a waiver was justified. Pet. App. B25-B36.[5]

4. The court of appeals affirmed in part and reversed in part. It agreed with the Board and the Director that Section 33(g) did not apply because petitioner participated in the Algenib settlements. Pet. App. C14-C16. The court explained that the purpose of that Section was to prevent "the claimant from acting unilaterally to the detriment of the employer by accepting less in settlement than [he] might be entitled to and thus reducing employer's offset." *Id.* at C14; see *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). That purpose would be "ill served" where an employer has

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[5] Judge Brown concurred with the holding that Section 33(g) did not apply, because Section 33 requires approval when the injured employee alone institutes the third-party suit, but not when the employer does so or when both sue the third party. Pet. App. B40-B41. He also found signing of the Department's form "superfluous in view of the signed agreement," and noted the employer's oral consent to the settlement. *Id.* at B42. He dissented on the offset issue, however, construing the settlement as a waiver of petitioner's lien for benefits already paid but not a waiver of its right to offset its future LHWCA liabilities against the Sellman settlement. *Id.* at B42-B55.

participated in the settlement process and thereby itself protected its offset right. Pet. App. C14-C15. Accordingly, the court read Section 33(g) to refer only to unilateral settlements by the claimant, and concluded that the statute "contains no reference to written approval or notice requirements where the employer participates in the settlements." Pet. App. C16.

The court reversed the Board's denial of an offset under Section 33(f). Without deciding whether extrinsic evidence was admissible, the court concluded that there was no evidentiary showing that petitioner intended to waive its lien.[6] Pet. App. C17-C18. Having found no waiver, the court then allowed petitioner to offset all of the net proceeds from the Sellman settlement against its LHWCA liability. Pet. App. C22-C23. Relying on *Force* v. *Kaiser Aluminum & Chemical Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 1 (1989), the court upheld petitioner's right to a total offset because the settlement agreement did not specifically apportion the amounts intended for the claimant and the amounts intended for family members. Pet. App. C23.[7]

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[6] Specifically, the court agreed with the dissenting Board member that the state court petition did not "augment" the I.T.O. and Sellman settlements and that the ALJ had misconstrued the testimony of the Algenib attorney. Pet. App. C18-C22.

[7] The court of appeals also rejected the Director's argument that petitioner waived its lien when it chose not to enforce its right to have the $250,000 in proceeds from the Sellman settlement transferred directly to itself. Pet. App. C23-C25.

5. The Director filed a petition for rehearing, noting that the Ninth Circuit had recently reversed *Force* in relevant part. *Force* v. *Director, OWCP*, 938 F.2d 981 (9th Cir. 1991). In response, the court of appeals amended its decision. Pet. App. E5. The court agreed with the Ninth Circuit that a settlement agreement that is silent on apportionment does not preclude the ALJ from determining the portion intended for the claimant and the portion intended for family members. The court of appeals also adopted the Ninth Circuit's view that the employer bears the burden of proof on the apportionment issue. *Id.* at E6-E7. The court remanded the case with the suggestion that the ALJ reopen the record for further evidence on any intended apportionment of the settlement proceeds. Pet. App. E7, E9.[8]

On September 22, 1992, the court denied a petition for rehearing, filed by petitioner. Pet. App. F1-F2.

ARGUMENT

1. Petitioner contends (Pet. 20-40) that Section 33(g)'s requirement of employer approval of third-party settlements applies even when the employer itself participates in the settlement. The court of appeals' decision rejecting that claim, which addressed a matter of first impression in the circuit courts, is correct and does not warrant this Court's review.

Section 33 of the LHWCA governs the rights of a person entitled to compensation and his employer in

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[8] The court rejected the Director's arguments that it had overstepped its scope of review by setting aside the ALJ's assessment of the existing offset evidence. Pet. App. E8.

recovering damages from a third party for a work-related injury. Both the person entitled to compensation and the employer have rights to sue a third party. See 33 U.S.C. 933(a) and (b). If the employer sues, it has an unqualified right to settle with the third party, and can retain that part of the net recovery required to fund its LHWCA liability. 33 U.S.C. 933(d) and (e). If the claimant sues, he retains his right to claim LHWCA compensation, 33 U.S.C. 933(a), but the employer can offset the claimant's net third-party recovery against its LHWCA liabilities. 33 U.S.C. 933(f). Section 33(g) protects the employer's offset rights by requiring the claimant to notify the employer of any settlement or judgment in his third-party suit and to obtain the employer's prior written approval of a settlement for less than the claimant's LHWCA compensation entitlement, or else forfeit rights to future compensation and medical benefits. 33 U.S.C. 933(g).

The Director has read Section 33(g)(1) to apply only where a claimant unilaterally settles a third-party action, and not where the employer participates in the settlement. The language of the statute, read in the context of the LHWCA, supports that interpretation. The statute provides for a forfeiture of LHWCA benefits if a "person entitled to compensation (or the person's representative) enters into a settlement with a third person" without employer approval. 33 U.S.C. 933(g)(1). The statute does not say that employer approval is required, and the forfeiture remedy applies, when the person entitled to compensation and the employer *jointly* settle with a third person. If Congress had intended to require

claimants to seek their employers' specific written approval of a settlement that the claimant and the employer jointly accomplish with a third person, it would have used language aptly designed to convey that requirement; but the statute does not do so. Moreover, there is no reason why Congress would have intended Section 33(g)'s written approval requirement to apply to such joint settlements, because Section 33 contemplates a suit by a claimant *or* a suit by the employer—not suits in which the claimant and the employer both participate in claiming against a third party.[9]

The Director's reading accords with the purposes and policies of the LHWCA. The written approval requirement "protects the employer against his employee's accepting too little for his cause of action against a third party." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2598 (1992), quoting *Banks*, 390 U.S. at 467. There would be no point in applying the written approval requirement, however, when the employer itself negotiates and agrees to the

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[9] Under Section 33(b), the claimant ordinarily has the right to sue, but a failure to do so within a specified period may operate as an assignment of this right to the employer. 33 U.S.C. 933(b); see *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981). In 1982, when petitioner and the Sellmans sued the Algenib defendants, only petitioner had a right to sue under the LHWCA, under prevailing Fourth Circuit law. See Pet. App. B21 n.9. Petitioner's statement that it was merely a "use plaintiff in the Claimant's third-party lawsuit," Pet. 6, is therefore inaccurate. See also *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969) (employer may sue third party independent of Section 33 to recover benefits it has paid).

third-party settlement. Just as the claimant's acceptance of a court-ordered remittitur does not implicate the policies underlying the written approval requirement of Section 33, *Banks*, *supra*, so too a joint settlement of a third-party claim does not implicate the purposes of Section 33.

The only purpose that would be served by applying Section 33 here would be to allow the employer to enter into a joint settlement and then refuse to sign the Department's form "for the sole purpose of defeating [a] Claimant's right to recover." Pet. App. A44-A45. The language of the LHWCA does not require that result, and the Act should be construed to avoid such "harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); see *Bell* v. *O'Hearne*, 284 F.2d 777, 781 (4th Cir. 1960) ("In the absence of language plainly demanding it, a construction [of Section 33(g)] is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.").[10]

Contrary to petitioner's contention (Pet. 20-25), the court of appeals' decision does not conflict with this Court's decision in *Estate of Cowart* v. *Nicklos Drilling Co.*, *supra*. The only question in that case was whether Section 33(g)'s forfeiture "applies to a

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[10] Petitioner does not dispute that its interpretation will lead to harsh and unfair results, but argues that the court of appeals' interpretation is contrary to the 1972 amendments to the LHWCA. Pet. 26-32. That is incorrect. Those amendments were designed to prevent courts from holding that employers "are estopped to deny they have given their written approval when in fact no such written approval was given," S. Rep. No. 1125, 92d Cong., 2d Sess. 14 (1972). Here, the court of appeals did not rely on estoppel. Pet. App. C15.

worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act." 112 S. Ct. at 2592. The Court held that Section 33(g) does apply in that situation and rejected the argument that an unpaid claimant is not a "person entitled to compensation" under Section 33(g). 112 S. Ct. at 2595-2598. The question here, in contrast, is whether Section 33(g) applies to joint settlements involving a person entitled to compensation, a third party, and the employer. The Court expressly declined to address that issue in *Estate of Cowart* "because it is not fairly included within the question on which certiorari was granted." 112 S. Ct. at 2598.[11]

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[11] Petitioner also errs in suggesting that the reasoning of *Cowart* is inconsistent with the court of appeals' decision. *Cowart*'s reasoning was based on the various uses of the phrase "person entitled to compensation" in the LHWCA, as well as the specific language in Section 33(g)(2) that removed any doubt that the forfeiture rule applied whether or not the settling claimant was receiving or had been acknowledged to be entitled to LHWCA benefits. 112 S. Ct. at 2595-2598. Here, in contrast, the issue turns on whether the employer's participation in the settlement is relevant to the applicability of the employer-approval requirement; the materials canvassed in *Cowart* do not address that issue. Petitioner also errs in stating (Pet. 40) that the Director's brief in *Cowart* argued that Section 33(g) should be "strictly construed." To the contrary, the Director recognized that the LHWCA should be liberally construed in favor of claimants, but noted that that rule does not override unambiguous terms of the statute. Gov't Br. at 31, *Estate of Cowart* v. *Nicklos Drilling Co.* (No. 91-17). The Director also pointed out that the issue involved in *this* case was not at stake in *Cowart*. *Id.* at 23 n.17.

Nor does the court of appeals' decision conflict with decisions of the Fifth Circuit, as petitioner argues. Pet. 34-40. The Fifth Circuit's original panel decision in *Cowart* did not address the three-party settlement question.[12] Although the panel decision included broad language indicating that there are "no exceptions" to Section 33(g)'s approval requirement, see Pet. 35-37, the panel decision was vacated when the full court granted rehearing, see 5th Cir. R. 35, I.O.P., and the full court, in reviewing the issue, did not adopt such broad language. See *Nicklos Drilling Co.* v. *Cowart*, 907 F.2d 1552, 1554 (1990), aff'd en banc, 927 F.2d 828 (5th Cir. 1991).

Similarly, a joint settlement was not at issue in *Petroleum Helicopters, Inc.* v. *Collier*, 784 F.2d 644 (5th Cir. 1986). In that case, the court held that Section 33(g) applied to a claimant's settlement with a third party even where an employer contractually waived its subrogation rights against the third party. 784 F.2d at 645-646. The Fifth Circuit's conclusion was based on its view that the employer retained an interest in the terms of the settlement despite its contractual waiver of subrogation. *Id.* at 646-647. That interest was the employer's "statutory right to a set-off against his compensation payments for any amount received by the employee by way of settlement with a third party tortfeasor" under Section 33(f). 784 F.2d at 646. Petitioner in the instant case stands in an entirely different posture, because it

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[12] Petitioner recognized in the court of appeals that the main issue before the Fifth Circuit in *Cowart* was different from the issue in this case. Pet. C.A. Reply Br. 6.

actually joined in the settlements with the third party.

2. Petitioner contends (Pet. 40-45) that the court of appeals erred in holding that when an employer seeks to credit a third-party recovery against its future LHWCA liabilities under Section 33(f), it bears the burden of proving how much of the recovery is apportionable to the person entitled to compensation.[13] There is no merit to that claim, and the court's decision does not conflict with that of any other court.

The court of appeals' allocation of the burden of proof is consistent with the general rule in LHWCA proceedings that doubtful questions of fact are resolved in the claimant's favor. See, *e.g.*, *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990); *Force* v. *Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991). The application of that rule here is particularly appropriate "because the employer remains liable for the full amount of the statutory compensation absent a showing that the claimant has been compensated by a third party." *Force*, 938 F.2d at 985. Section 33(f) gives an employer what amounts to an affirmative defense to an otherwise valid claim. "To ensure that the claimant receives his due, the employer must carry the burden of proving what is the claimant's portion of the group settlement." 938 F.2d at 985; see also Pet. App. E7.

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[13] Petitioner does not dispute that it may credit only settlement amounts attributable to Mr. Sellman and not amounts attributable to Sellman family members. See *Force* v. *Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991); 2A Arthur Larson, *The Law of Workmen's Compensation* § 74.36 (1992).

Petitioner does not dispute that it is "most similarly situated to a plaintiff" on the apportionment issue, Pet. App. E7, but instead argues (Pet. 42) that the burden of proof should be placed on the claimant because Section 33(f) is designed to protect the employer. The provision, however, is at least partially designed to ensure that if the claimant received less in a tort suit than what he was entitled to under the LHWCA, the employer would make up the difference.[14] Nor will employers have undue difficulty in meeting their burden of proof, as petitioner states (Pet. 43, 45). ALJs can "look to such objective factors as how the settlement sum was actually distributed * * * and the going rate for settlements or judgments for the same types of injuries." *Force*, 938 F.2d at 986; see also Pet. App. E5-E6. Employers and claimants

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[14] As enacted, the LHWCA required a claimant to elect between suing a third party and receiving compensation. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33, 44 Stat. 1440. Section 33(f) mitigated that election requirement by providing that if the third-party recovery was less than the claimant would have received in compensation, the employer would make up the difference. See *Chapman* v. *Hoage*, 296 U.S. 526, 528 (1936). After the LHWCA was amended to allow a claimant to sue a third party while receiving compensation, courts construed Section 33(f) to provide a lien on a claimant's third-party recovery in favor of an employer who had paid compensation. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 79 (1980). The purpose of the lien was to prevent a claimant from receiving double recovery, *ibid.*, not to assist employers in meeting their obligations to make future payments.

should have relatively equal access to such information.[15]

In any event, the issue does not merit this Court's attention at this time, as the decision below is interlocutory. The ALJ has not yet determined how to apportion the Sellman settlement proceeds, and the allocation of the burden of proof may make no difference to the result in this case. There is no reason for this Court to depart from its usual practice of declining to review orders of the courts of appeals that are not final. See *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967).

3. Petitioner argues (Pet. 46-55) that the court of appeals violated federal procedural rules and denied it due process by granting the Director's petition for rehearing without accepting a response. As petitioner recognizes (Pet. 46-47), Fed. R. App. P. 40(a) provides that a court "ordinarily" will not grant rehearing without requesting a response. The clear implication of the rule is that a court may refrain from obtaining a response in appropriate circumstances. See *United States* v. *Allegheny-Ludlum Indus., Inc.*, 568 F.2d 1073 (5th Cir. 1978) (no response to rehearing petition necessary where intervening decision of this Court is controlling); cf. R. Stern, E.

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[15] Petitioner also argues (Pet. 44) that the settlements in this case are unambiguous and that allowing extrinsic evidence to prove apportionment will violate the parol evidence rule. That factbound issue does not merit review, but we note that petitioner is wrong; the settlements *are* ambiguous, because they provide that *all* Sellmans are settling parties but are silent as to how much of the Sellman settlements each Sellman receives. See Pet. App. A26-A27.

Gressman, & S. Shapiro, *Supreme Court Practice* 616 (6th ed. 1986) (this Court has occasionally "viewed the grounds for rehearing as so strong and so obvious that calling for a response was deemed superfluous"). Here, the Director's petition informed the court that the Ninth Circuit had recently reversed the Benefits Review Board's decision on which the court of appeals had relied in its initial opinion. Pet. App. E5. A response was unnecessary because it was obvious that the court would have to amend its opinion to address the Ninth Circuit's reversal.

Moreover, the court of appeals did not deprive petitioner of an opportunity to be heard on the Section 33(f) issue. When the court granted rehearing, that issue had already been fully briefed and argued; the Ninth Circuit decision was simply a significant and relevant authority that was presented to the court after briefing and argument. Due process does not require a court to entertain any additional argument in such circumstances. Cf. Fed. R. App. P. 28(j) (when a party brings such authorities to the court's attention before decision, it must do so "without argument"). Moreover, petitioner had the opportunity to present its views on *Force* in its own petition for rehearing that it filed after the court issued its amended decision.[16]

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[16] Petitioner errs in arguing (Pet. 49-51) that the Director's petition for rehearing was untimely. The Director requested and the court granted an extension of time to file the petition within the 14-day period specified in Fed. R. App. P. 40(a). See App., *infra* (order granting extension within 14-day period). Petitioner's complaint that the Fourth Circuit violated its own rules in granting the extension is also meritless, see 4th Cir. I.O.P. 40.2, 40.3, and, in any event,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993

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whether the court of appeals complied with its internal operating procedures in granting an extension of time is not a question that merits this Court's attention.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1531
87-1913

I.T.O. CORPORATION OF BALTIMORE
PETITIONER

v.

WILLIAM SELLMAN; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
RESPONDENTS

[Filed Feb. 3, 1992]

ORDER

The government has filed a motion for an extension of time to file a petition for rehearing.

The Court extends the time for filing a petition for rehearing pursuant to I.O.P. 40.3 until February 19, 1992. If the government determines not to seek rehearing prior to the expiration of the time period as extended, counsel shall immediately notify the Court in writing.

For the Court—By direction.

/s/ John M. Greacen

CLERK